carried in it habitually or as a matter of practice, the vehicle must be covered in respect of them'. In that case, as the plaintiff was not obliged to travel in the car provided, the injury sustained by him did not arise out of or in the course of his employment and the UK Court of Appeal held that the third party insurers were not therefore liable to indemnify the employers.

Apart from the Malaysian cases quoted as well as the non-Malaysian cases which are of course persuasive authorities, there is another relevant case which should be considered, ie *Tan Keng Hong & Anor* v *New India Assurance Co Ltd.*[8] In that case, their Lordships of the Privy Council held in 1978 that the words 'by reason of his contract of employment' must be read in conjunction with the words 'in pursuance of', and properly construed, mean because the contract of employment expressly or impliedly requires the employee or gives him the right to travel in the motor vehicle concerned. In that case, their Lordships referred to *Izzard* v *Universal Insurance Co Ltd*[9] and pointed out that Lord Wright, with whose speech Lords Atkin, Thankerton, Russell of Killowen and Roche agreed, said at p 782:

> I think the Act (the language of which is the same as that of the policy) is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons.

In *Tan Keng Hong*'s case,[8] the Privy Council pointed out that on the facts as found, the deceased forester was certainly not on the lorry for business reasons but for personal reasons, ie for his own personal convenience. In that case, there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on the appellant's lorry and therefore the insurers were rightly held not to be liable under the policy. In our present case, the plaintiff was working as a salesman for the registered owner of the said vehicle selling biscuits and going from place to place in the said vehicle. He was therefore required by his contract of employment with his employer, the said Lim Yoke Pak, to travel on the lorry (vide the notes of evidence in pp 27 to 28 of the appeal records). In the circumstances of this case, we therefore consider that the learned judge was right in deciding that, upon a proper construction of the policy of insurance dated 19 May 1972, and ss 75(1) and 80(1) of the Ordinance, the defendant was liable to pay the plaintiff the amount due under the judgment dated 15 June 1978. We would therefore dismiss the appeal with costs.

There is, however, one observation which we ought to make which is that this suit was filed in June 1980 and was not heard by the High Court until more than seven years later on 17 September 1987. Judgment was finally delivered by the High Court on 27 June 1988. We would therefore urge all High Court judges who hear such claims for damages due to motor accidents to try these cases as early as possible so that a plaintiff who succeeds in getting damages as in this case would not have to wait for more than a decade before getting his compensation.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co; Chooi & Co.*

Reported by *Prof Ahmad Ibrahim*

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## Vije & Co v Co-operative Central Bank Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3-24-39-89
VC GEORGE J
21 MARCH 1991

*Legal Profession — Solicitors' costs — Money standing to credit of client in solicitors' client account — Bills of costs delivered — No dispute over bills during material period — Solicitors setting off money in account against costs — Whether money in account is trust money — Whether solicitor entitled to set-off — Legal Profession Act 1976, ss 126 & 128 — Solicitors' Accounts Rules 1978, rr 7 & 15*

*Legal Profession — Solicitors' costs — Co-operative bank granting loans to members — Solicitors instructed to prepare loan documents — Solicitors instructed that solicitors' fees payable by members — Solicitors also instructed in some instances that bank not liable for any fees unpaid — Fees not paid by members — Whether solicitors entitled to raise bills against bank*

*Trusts and Trustees — Solicitors' client account — Money standing to credit of client in solicitors' client account — Whether solicitors trustees of money for client*

*Words and Phrases — 'Client's money' — Solicitors' Account Rules 1978, r 7*

*Words and Phrases — 'Trust money' — Solicitors' Account Rules 1978, r 7*

The plaintiffs are a firm of advocates and solicitors. There was standing to the credit of the defendant, which was a co-operative bank, the sum of $317,562 in the plaintiffs' client account. The plaintiffs had acted as solicitors for a certain housing developer who owed the defendant substantial sums of money. Certain other clients of the plaintiffs, who were government servants, had entered into agreements with the developer to purchase houses to be built by the developer. The purchasers had borrowed the aggregate sum of $317,562 from the government to assist them in their respective purchases. The government paid this sum to the plaintiffs and the sum was credited to the plaintiffs' client account. They instructed the plaintiffs to pay the sum to the defendant upon certain undertakings being given. The undertakings were duly provided.

On 7 March 1989, the defendant was placed under receivership. Earlier, the plaintiffs had drawn out the sum of

$231,101.25 and the sum of $86,460.75 from the client account after giving notice each time to the defendant of their intention to do so. The sums were drawn out and paid to account of fees said to be due from the defendant to the plaintiffs.

By an originating summons issued on 23 February 1989, the plaintiffs had sought declarations to the effect that the said drawings were in order and if not, that the plaintiffs were in any event entitled to a lien or a set-off in respect of the sum of $317,562. Between July and November 1987, the plaintiffs had rendered bills of costs for the aggregate sum of $402,250 to the defendant for professional services rendered by them in a number of civil suits. The plaintiffs said that these bills were ignored by the defendant. After the originating summons had been initiated, the plaintiffs and the receivers agreed to a settlement at the sum of $239,092. However, it was not agreed that the plaintiffs had the right to draw on the money held by them.

The plaintiffs had delivered to the defendant between August 1986 and February 1987 bills of costs for the total sum of $68,550 for professional opinions and advice given. These bills too were ignored by the defendants and there was no dispute over the quantum of the bill until after the initiation of the originating summons.

The plaintiffs also claimed a total sum of $163,597.25 for loan documentation work undertaken for the defendant. The bills relating to this sum were delivered to the defendant in the years 1985, 1986 and 1987. There was no evidence that the defendant had disputed these bills. The work undertaken by the plaintiffs was in respect of loans approved by the defendant in favour of four members of the defendant. In each case, the defendant had given a letter to the plaintiffs instructing them to prepare the relevant documents. Together with the instructions was a copy of a letter of offer to each member from the defendant, in each of which letters was stated that a term of the agreement for loan would be that all legal charges and expenses, including the defendant's solicitor and client costs incurred in documentation and the collection of any outstanding amount, were to be borne by the member concerned. In each of the letters giving instructions to the plaintiffs, the letter of offer to the member was referred to and it was pointed out that 'All legal expenses in this respect will be borne by the member'. The letters of instruction in respect of all the members save for one Suhaimi bin Babjee also stated that 'the bank shall not be liable for any fees unpaid and due for any reason whatsoever in your taking instructions to document this loan facility'.

The plaintiffs raised bills for work undertaken against the relevant members but when the bills were not paid, the plaintiffs raised bills against the defendant. The defendant did not pay the bills. The receivers said that as it had been made abundantly clear to the plaintiffs that the borrowers were to be responsible for the fees involved, whether the defendant had disputed the bills or not was not relevant. It was contended for the receivers that the whole of the money standing to the credit of the defendant in the plaintiffs' client account was trust money and that the application of the amount by the plaintiffs was not in order.

**Held,** allowing the plaintiffs' application:

(1) Under the Legal Profession Act 1976 ('the Act'), the party chargeable or the person liable to pay the costs, if he disputes a solicitor's bill of costs, has to obtain by petition an order for the taxation of the bill. This has to be done within six months from the delivery of the bill. Section 128 of the Act provides that thereafter no order shall be made for taxation of a solicitor's bill of costs 'except under special circumstances to be proved to the satisfaction of the court'. However s 128(1) provides that in any event no such order shall be made after the expiry of one year from the delivery of the bills of costs.

(2) It was clear that neither the defendant nor the receivers were entitled at this late stage to dispute the quantum of the said bills in respect of the litigation and in respect of opinion and advice.

(3) The instruction that 'All legal expenses in this respect will be borne by the member' amounted to an assurance to the plaintiffs that their fees 'will be borne by the member'. Where the plaintiffs had relied on the said assurance, as they appeared to have done, they would be justified in proceeding and completing the documentation and billing the borrower members for the fees involved and, in the event any such member refused or failed to pay the fees, the plaintiffs would be perfectly entitled to look to the defendant to pay their fees for the work done which, as had been seen, was done on the instructions of the defendant.

(4) The inclusion of the paragraph 'The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instruction to document this loan facility' was as clear notice as one could expect to the plaintiffs to look for their fees only from the borrower and if they chose to undertake the job as they did, it must be assumed that they did it on the term that they were not entitled to look to the defendant for the legal fees.

(5) Accordingly the bill of costs in respect of the work done in respect of the loan to Suhaimi bin Babjee was properly raised against the defendant. The bills in respect of the other three cases were not properly raised as against the defendant and the defendant were justified in ignoring them. The provisions of ss 126 and 128 of the Act have no relevance where the solicitor raises a bill that he is not entitled to raise. The provisions of these two sections, however, precluded the defendant and the receivers from questioning the quantum of the bill raised in respect of the work done for the loan to Suhaimi bin Babjee.

(6) Under the Solicitors' Account Rules 1978, money held in a solicitor's client account with a bank could, at least in theory, include money which is not 'client's money' and if, and only if, such money (which is not client's money) is the subject of a trust does it come within the definition of 'trust money'. There are two ingredients: (a) it must not be 'client's money'; and (b) it must be the subject of a trust. If the money was 'client's money' within the terms of the definition of that phrase in the rules, then even if it is the subject of a trust it is not 'trust money' within the meaning of that phrase in the rules. If, however, the money was received on account of trustees of a trust of which the solicitor is solicitor-trustee, such money, even though held in the client account, is not 'client's money'. For the purposes of the rules, only money which does not fall within the definition of 'client's money' and which is subject to a trust is to be regarded as 'trust money'. Once the undertakings were provided the money was deemed to be held or received by the plaintiffs on account of the defendant and it was clearly held or received in connection with the plaintiff's practice as solicitors within the meaning of 'client's money' in the rules.

(7) The sum of $317,562, even if it may have been 'trust money' when it was initially paid to the plaintiff by the government (in all probability it was not), metamorphosed into 'client's money' when it was deemed to be held to the credit

of the defendant. In any event, r 15 of the rules preserves the solicitor's right of recourse by way of lien, set-off, counter-claim, charge or otherwise against money standing to the credit of a client's account. Even if the money continued to be trust money, the beneficiary of the money now being the defendant, the plaintiffs had the right of recourse (in respect of the fees owed by the defendant) by way of, inter alia, set-off against the money standing to the credit of the defendant. 'Set-off' here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held.

**[Bahasa Malaysia summary**

Plaintif adalah satu firma peguambela dan peguamcara. Terdapat baki kredit bagi pihak defendan, satu bank ko-operatif, sejumlah $317,562 di dalam akaun klien plaintif. Plaintif telah bertindak sebagai peguamcara untuk suatu pemaju perumahan yang berhutang kepada defendan jumlah wang yang banyak. Beberapa klien lain plaintif, yang merupakan kakitangan kerajaan, telah membuat persetujuan dengan pemaju tersebut untuk membeli rumah-rumah yang akan dibina oleh pemaju itu. Pembeli telah meminjam sejumlah $317,562 daripada kerajaan untuk membantu mereka dalam pembelian masing-masing. Kerajaan telah membayar jumlah ini kepada plaintif dan jumlah itu telah dikreditkan kepada akaun klien plaintif. Pembeli telah menyuruh plaintif membayar jumlah itu kepada defendan setelah beberapa jaminan yang tertentu diberi. Jaminan itu kemudiannya diberikan.

Pada 7 Mac 1989, defendan telah diletakkan di bawah penerimaan. Terdahulu daripada itu, plaintif telah mengeluarkan sejumlah $231,101.25 dan sejumlah $86,460.75 daripada akaun klien setelah memberi notis setiap kali kepada defendan tentang tujuan mereka berbuat demikian. Jumlah-jumlah tersebut telah dikeluarkan dan dibayar untuk meliputi fee yang kononnya patut dibayar oleh defendan kepada plaintif.

Melalui satu saman pemula yang dikeluarkan pada 23 Februari 1989, plaintif telah memohon satu deklarasi bahawa pengeluaran tersebut adalah betul dan jika tidak, bahawa plaintif dalam apa keadaan sekalipun berhak kepada satu lien atau satu pengimbangan (set-off) berkenaan jumlah $317,562 itu. Antara Julai dan November 1987, plaintif telah menyampaikan bil-bil kos bagi jumlah agreget $402,250 kepada defendan untuk khidmat profesyenal yang telah diberikan oleh plaintif di dalam beberapa guaman sivil. Plaintif mengatakan bahawa bil-bil tersebut tidak diendahkan oleh defendan. Setelah saman pemula dimulakan, plaintif dan penerima bersetuju kepada satu penyelesaian pada jumlah $239,092. Walau bagaimanapun, tidak dipersetujui bahawa plaintif berhak mengeluarkan wang yang dipegang oleh mereka.

Antara Ogos 1986 dan Februari 1987, plaintif telah menyampaikan kepada defendan bil-bil kos bagi jumlah $68,550 untuk pendapat profesyenal dan nasihat yang telah diberikan. Bil-bil itu juga tidak dipedulikan oleh defendan dan tidak ada pertikaian tentang kuantum bil-bil itu sehingga selepas permulaan saman pemula itu.

Plaintif juga menuntut sejumlah $163,579.25 untuk kerja dokumentasi pinjaman yang dibuat oleh defendan. Bil-bil berkenaan dengan jumlah ini telah disampaikan kepada defendan dalam tahun 1985, 1986 dan 1987. Tidak ada keterangan bahawa defendan telah mempertikaikan bil-bil itu. Kerja yang dibuat oleh plaintif adalah berkenaan dengan pinjaman yang telah diluluskan oleh defendan bagi empat ahli defendan. Dalam setiap kes, defendan telah memberi surat kepada plaintif menyuruh mereka menyediakan dokumen yang relevan. Bersama dengan arahan itu ialah satu salinan sepucuk surat tawaran keapada setiap ahli defendan. Di dalam setiap surat tersebut dinyatakan bahawa satu syarat persetujuan bagi pinjaman itu ialah bahawa semua kos dan perbelanjaan tindakan undang-undang, termasuk kos peguamcara dan klien defendan yang terkena dalam dokumentasi dan pemungutan apa-apa amaun yang tidak dijelaskan, akan ditanggung oleh ahli tersebut. Di dalam setiap surat yang memberi arahan kepada plaintif, rujukan dibuat kepada surat tawaran itu dan telah ditegaskan bahawa 'All legal expenses in this respect will be borne by the member'. Surat tawaran kepada semua ahli-ahli itu kecuali satu Suhaimi bin Babjee juga menyatakan bahawa 'the bank shall not be liable for any fees unpaid and due for any reason whatsoever in your taking instructions to document this loan facility'.

Plaintif telah mengeluarkan bil-bil untuk kerja yang telah dijalankan terhadap ahli-ahli itu tetapi apabila bil-bil itu tidak dibayar, plaintif telah mengeluarkan bil-bil terhadap defendan. Defendan tidak membayar bil-bil itu. Penerima mengatakan bahawa oleh kerana plaintif telah diberitahu dengan sangat jelas bahawa peminjam akan bertanggungjawab untuk fee yang dikenakan, sama ada defendan telah mempertikaikan bil-bil itu atau tidak tidaklah relevan. Telah dihujah bagi pihak penerima bahawa kesemua wang yang berada dalam kredit defendan di dalam akaun klien plaintif adalah wang amanah dan bahawa penggunaan amaun tersebut oleh plaintif adalah tidak betul.

**Diputuskan,** meluluskan permohonan plaintif itu:

(1) Di bawah Akta Profesyen Undang-Undang 1976 ('Akta itu'), pihak yang boleh dikenakan atau orang yang wajib membayar kos, jika beliau mempertikaikan bil kos seseorang peguamcara, mesti memperolehi melalui petisyen satu perintah untuk penetapan bil itu. Ini mesti dibuat dalam masa enam bulan dari tarikh penyampaian bil itu. Seksyen 128 Akta itu memperuntukkan bahawa selepas itu tiada perintah akan dibuat untuk penetapan satu bil kos seseorang peguamcara 'except under special circumstances to be proved to the satisfaction of the court'. Walau bagaimanapun, s 128(1) memperuntukkan bahawa dalam apa keadaan sekalipun tiada perintah sebegitu akan dibuat selepas penghabisan satu tahun dari tarikh penyampaian bil kos.

(2) Adalah jelas bahawa defendan dan penerima tidak berhak di peringkat yang lewat ini untuk mempertikaikan kuantum bil-bil tersebut berkenaan dengan litigasi dan berkenaan dengan pendapat dan nasihat.

(3) Arahan bahawa 'All legal expenses in this respect will be borne by the member' bertindak sebagai jaminan kepada plaintif bahawa fee mereka 'will be borne by the member'. Di mana plaintif telah bergantung kepada jaminan itu, seperti yang nampaknya telah dibuat oleh mereka, memanglah wajar bagi mereka mengambil langkah menyelesaikan dokumentasi itu dan mengeluarkan bil kepada ahli-ahli peminjam untuk fee yang berkenaan, dan, jika seseorang ahli itu enggan atau gagal membayar fee itu, plaintif sememangnya berhak berpaling kepada defendan untuk membayar fee mereka untuk kerja yang telah dibuat yang, seperti yang telah dilihat, telah dibuat atas arahan defendan.

(4) Kemasukan perenggan 'The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instruction to document this loan facility' adalah satu notis yang sejelas yang boleh diharapkan kepada plaintif untuk mendapatkan fee mereka cuma daripada peminjam dan jika mereka memilih untuk menjalankan kerja itu seperti yang telah dilakukan oleh mereka, anggapan mesti dibuat bahawa mereka telah menjalankan kerja itu atas terma bahawa mereka

tidak berhak berpaling kepada defendan untuk fee tindakan undang-undang.

(5) Justeru itu bil kos berkenaan dengan kerja yang dijalankan berkenaan dengan pinjaman kepada Suhaimi bin Babjee telah dikeluarkan dengan betul terhadap defendan. Bil-bil berkenaan dengan tiga kes lain tidak dikeluarkan dengan betul terhadap defendan dan defendan wajar tidak mempedulikan mereka. Peruntukan ss 126 dan 128 Akta itu tidak relevan apabila seseorang peguamcara mengeluarkan satu bil yang beliau tidak berhak berbuat demikian. Peruntukan kedua-dua seksyen itu, walau bagaimanapun, menahan defendan dan penerima daripada menyoal kuantum bil yang dikeluarkan berkenaan dengan kerja yang dilakukan untuk pinjaman kepada Suhaimi bin Babjee.

(6) Di bawah Kaedah-Kaedah Akaun Peguamcara 1978, wang yang dipegang di dalam satu akaun klien peguamcara dengan satu bank boleh, sekurang-kurangnya dalam teori, meliputi wang yang bukan 'wang klien' dan jika, dan cuma jika, wang sebegitu (yang bukan wang klien) adalah tertakluk kepada satu amanah barulah ia termasuk di dalam definasi 'wang amanah'. Terdapat dua ramuan: (a) ia mestilah bukan 'wang klien'; dan (b) ia mesti tertakluk kepada satu amanah. Jika wang itu adalah 'wang klien' mengikut definasirangkaikata itu di dalam kaedah-kaedah itu, jadi biarpun ia adalah tertakluk kepada satu amanah ia bukanlah 'wang amanah' mengikut makna rangkaikata itu di dalam kaedah-kaedah itu. Jika, walau bagaimanpun, wang itu diterima bagi akaun pemegang amanah satu amanah di mana peguamcara itu adalah peguamcara-pemegang amanah, wang demikian, biarpun dipegang di dalam akaun klien, bukanlah 'wang klien'. Bagi tujuan kaedah-kaedah itu, cuma wang yang tidak termasuk di dalam takrif 'wang klien' dan yang tertakluk kepada satu amanah boleh dianggap sebagai 'wang amanah'. Apabila jaminan diberikan wang itu dianggap sebagai dipegang atau diterima oleh plaintif bagi akaun defendan dan ia jelasnya dipegang atau diterima bersangkutan dengan amalan plaintif sebagai peguamcara mengikut makna 'wang klien' di dalam kaedah-kaedah itu.

(7) Jumlah $317,562, meskipun jika ia mungkin menjadi 'wang amanah' apabila ia mula-mulanya dibayar kepada plaintif oleh kerajaan (dalam semua kebarangkalian tidak), bertukar (metamorphosed) menjadi 'wang klien' apabila ia dianggap sebagai dipegang bagi kredit defendan. Dalam apa keadaan pun, k 15 kaedah-kaedah itu memelihara hak peguamcara mendapat bantuan melalui lien, pengimbangan, tuntutan balas, cagaran atau kaedah lain terhadap wang yang berada dalam kredit sesuatu akaun klien. Meskipun jika wang itu terus menjadi wang amanah, oleh kerana benefisiari wang itu sekarang merupakan defendan, plaintif berhak mendapat bantuan (berkenaan fee yang dihutang oleh defendan) melalui, antara lainnya, pengimbangan terhadap wang yang berada dalam kredit defendan. 'Pengimbangan' di sini tidak terhad kepada satu pengimbangan yang dijadikan pli didalam pernyataan pembelaan tetapi mempunyai rujukan kepada hak mengimbangkan amaun yang dihutang dengan amaun yang dipegang.]

**Legislation referred to**
Contracts Act 1950 s 42
Legal Profession Act 1976 ss 126(1), 128(2)
Solicitors' Account Rules 1978 rr 7, 15
Solicitors' Accounts Rules 1975 [UK]

*Joginder Singh* for the plaintiff.
*Patrick Chen* for the defendant.

*Cur Adv Vult*

**VC George J:** Mr P Vijendran practises as an advocate and solicitor under the name and style of Vije & Co who are the plaintiffs in this originating summons which was issued on 23 February 1989. The defendant co-operative bank was placed under receivership on 7 March 1989 and two partners of the firm of accountants, Hanafiah Raslan Mohammed & Co, were appointed receivers and managers. There was standing to the credit of the defendant in the plaintiffs' client account an amount of $317,562. On or soon after 2 August 1988, the plaintiffs, after giving written notice to the defendant that they were going to do so, drew $231,101.25 out of the said amount and applied that amount in satisfaction of amounts said to be owing to the plaintiffs from the defendant in respect of fees for work done. On or soon after 17 February 1989, the balance amount of $86,460.75 held in favour of the defendant was also, after a similar notice, drawn in purported part satisfaction of further amounts said to be due from the defendant to the plaintiffs as fees.

By this originating summons, the plaintiffs seek declarations to the effect that the said drawings were in order and, if not, that the plaintiffs are in any event entitled to a lien or a set-off in respect of the $317,562.

By his affidavit in support of the originating summons, Mr Vijendran explains that his firm had acted as solicitors and he as counsel for the defendant in a number of civil suits from about June 1986. Particulars of the relevant suit numbers are given in the affidavit in support. Haji Ahmad Kamal bin Abdullah Al-Yafii, one of the receivers, admits that bills of costs in respect of these suits were rendered to the defendant between July 1987 and November 1987, the aggregate of which comes to some $405,250. Mr Vijendran in effect deposes that these bills appear to have been ignored by the bank. However, after the instant originating summons had been initiated, a settlement in respect of the quantum of these litigation bills was apparently arrived at between the plaintiffs and the receivers in the sum of $239,092. However, no agreement as to the right of the plaintiffs to draw on the money held by them was arrived at.

Mr Vijendran also deposes to having given professional opinions and advice to the defendant bank in respect of a number of matters in respect of which bills of costs were raised which apparently were also ignored. Haji Ahmad Kamal in his affidavit conceded that bills under this category of work were rendered between August 1986 and February 1987 totalling $68,550. In his affidavit in reply to the application, Haji Ahmad Kamal says that while the defendants are liable for fees for the work done, they had at all material times disputed the quantum of the bills. However, there was no evidence of any manifestation of such disputes. Counsel for the receivers had to concede that until the quantum of the bill was questioned by Haji Ahmad Kamal in his

affidavit in reply affirmed on 7 April 1990, there appears to be no evidence that the bills had been disputed.

A third category of work done by the plaintiffs was in the preparation of the relevant documentation and related work in respect of loans approved by the defendant co-operative bank in favour of certain members of the defendant, namely, one Che Ismail bin Che Wan, one Suhaimi bin Babjee, one Tan Kim Wah and one Mohd Taib Ibrahim. Apparently, in each of these cases, the member concerned had approached the defendant bank for a loan. In each case the defendant bank, having approved the application, had written to the plaintiffs instructing them to prepare the relevant documentation for due execution by the lender and the borrower. Together with the instructions, a copy of the letter of offer to the member concerned was sent to the plaintiffs in each of which was stated that a term of the agreement for the loan would be that 'All legal charge and expenses including the bank's solicitor-client cost incurred in documentation and collection of any outstandings are to be borne by you (ie the member concerned)'.

In each of the letters giving instructions to the plaintiffs, reference was made to the relevant letter of offer to the member and it was pointed out to the plaintiffs that 'All legal expenses in this respect will be borne by the member.' By the letters of instruction in respect of Che Ismail bin Che Wan, Tan Kim Wah and Mohd Taib Ibrahim, the plaintiffs were further told that, 'The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instructions to document this loan facility'. This was not stated in the letter of instruction in respect of Suhaimi bin Babjee. The effect of this omission will be considered later in this judgment. The relevant loan documentation was apparently duly prepared by the plaintiffs in respect of each of the aforesaid members and, as instructed, provisions were made in the loan agreement for the borrower to be responsible for all the fees payable in respect thereof. No doubt because of the term in the agreement in respect of the legal costs and because of what had been stated in the defendant's letters of instruction in respect of the fees for the work done, the plaintiffs had raised bills against the relevant borrowers. However, they were not paid by any of them and when the plaintiffs realized they were not going to be paid by the individual members, they raised bills for the work done against the defendant bank, one each in May 1985, April and August 1986 and the last one in December 1987. There is no evidence of the defendant disputing any of these bills on principle or on quantum. However, none of the bills or any part of them was settled. The total of these loan documentation bills was $163,597.25.

As to these bills, the receivers' stand is that it having been made abundantly clear to the plaintiffs that the borrowers were to be responsible for the fees involved, whether the defendant had disputed the bills or not is not relevant.

Now, Part IX of the Legal Profession Act 1976 ('the Act') provides the procedures for disputing a solicitor's bill of costs. The party chargeable or the person liable to pay the costs, if he disputes the bill, has to obtain by petition an order for the taxation of the bill. By s 126(1), this has to be done within six months from the delivery of the bill. Section 128 provides that thereafter, no order shall be made for taxation of a solicitor's bill of costs 'except under special circumstances to be proved to the satisfaction of the court'. However, s 128(2) provides that, in any event, no order shall be made for the taxation after the expiry of one year from the delivery of the bill of costs.

Applying these sections, it is clear that neither the defendant nor the receivers are entitled at this late stage to dispute the quantum of the said bills in respect of the litigation (which quantum, in any event, has been settled at $239,092). Similarly, neither the defendant nor the receivers are entitled at this late stage to question the quantum of the bills amounting to $68,550 in respect of the opinion and advice.

As to the bills in respect of the work done on the loan documentation, it is contended on behalf of the plaintiffs that in spite of the term incorporated in the loan agreement for all the relevant fees to be paid by the borrower, and in spite of the defendant bank stating in its letters in which the said instructions were given to the plaintiffs that the 'bank will not be liable for any fees unpaid and due for any reason whatsoever ... ', the plaintiffs were entitled to bill the bank for the work done. The plaintiffs rely on s 42 of the Contracts Act 1950. In my judgment, on the facts, the reliance on that section is based on a misconception of the section.

The plaintiffs also rely on the submission that on a true construction of the instructions given to them in respect of the payment of the fees for the work done, if the relevant member fails to pay the relevant fees the plaintiffs were entitled to recover the fees from the defendant since it was the defendant who had given the instructions to the plaintiffs in respect of the work that was to be done and which was done.

In the context, the case of Suhaimi bin Babjee has to be looked at separately from the other three cases because of the difference in the instructions given in respect of legal expenses. In the case of Suhaimi bin Babjee the instructions were that 'All legal expenses in this respect will be borne by the member'. In the other three cases, the bank, having in its instructions to the plaintiffs said exactly the same thing, went on to state:

> The bank shall not be liable for any fees unpaid and due for any reason whatsoever on your taking instruction do (to) document this loan facility.

This latter paragraph is omitted from the letter of instruction to the plaintiffs in respect of the loan to Suhaimi bin Babjee. In my view, without the latter paragraph, what we have is the bank requiring the solicitors to get on with the work acting as the bank's solicitors with the instructions to include a term in the loan agreement that all the legal fees and expenses involved in respect of the loan would be paid by the borrower. There is, with the instruction, what amounts to an assurance to the solicitors that their fees 'will be borne by the member'. In the face of that it seems to me that where the solicitors had relied on the said assurance as they appeared to have done, they would be justified in proceeding and completing the documentation and billing the borrower members for the fees involved and, in the event any such member refuses or fails to pay the fees, the solicitors would be perfectly justified in informing the bank that in spite of the assurance given by the bank that 'the legal expenses ... will be borne by the member', the member has failed to bear the expenses. In the event, the solicitors would be perfectly entitled to look to the bank to pay their fees for the work done which, as has been seen, was done on the instructions of the bank.

The inclusion of the said latter paragraph in the letter of instruction, however, throws a different complexion to the matter to the effect that the bank is saying that the position is that the legal expenses will be met by the borrower and the solicitors are to further take note that the bank 'shall not be liable for any fees unpaid ... '. This is as clear a notice as one could expect to the solicitors to look for their fees *only* from the borrower and if they chose to undertake the job as they did, it must be assumed that they did it on the terms that they are *not* entitled to look to the bank for the legal fees.

Accordingly, in my judgment, the bill of costs in respect of the work done in respect of the loan to Suhaimi bin Babjee was properly raised against the bank. The bills in respect of the other three cases were not properly raised against the bank and the bank was justified in ignoring them. The provisions of ss 126 and 128 of the Act have no relevance where the solicitor raises a bill that he was not entitled to raise. The provisions of these two sections, however, precluded the defendant and the receivers from questioning the quantum of the bill raised in respect of the work done for the loan to Suhaimi bin Babjee. The amount is $9,956. Thus the amount which the bank and the receivers are not entitled to question amounts to $317,598 which is the aggregate of the agreed amount of $239,092, the said $68,550 and the said $9,956.

The defendant by the receivers have not only attempted to dispute the bills but also the right of the solicitors to draw as they did on the said $317,562 standing to the credit of the defendant bank in the plaintiffs' client account.

The plaintiffs rely on r 7(a)(iv) of the Solicitors' Account Rules 1978 ('the rules') in support of their contention that the drawings made by them were in order. Alternatively, they say that, in any event, r 15 allowed them the right to draw the amount. The relevant portion of r 7(a) (and of r 7(b) which has also to be looked at) and r 15 are as follows:

> 7 Drawing money from client account.
>
> There may be drawn from a client account —
>
> (a) in the case of client's money —
>
> ...
>
> (iv) money properly required for or towards payment of the solicitor's costs where a bill of costs or other written intimidation of the amount of the costs incurred has been delivered to the client and the client has been notified that money held for him will be applied towards or in satisfaction of such costs.
>
> (b) in the case of trust money —
>
> (i) money properly required for a payment in the execution of the particular trust; and
>
> (ii) money to be transferred to a separate bank account kept solely for the money of the particular trust;
>
> ...
>
> 15 Right or recourse of a solicitor against moneys standing to the credit of a client account not affected by the rules.
>
> Nothing in these rules shall deprive a solicitor of any recourse or right, whether by way of lien, set-off, counterclaim, charge or otherwise, against moneys standing to the credit of a client account.

Counsel for the receivers contended that the whole of the money standing to the credit of the defendant in the plaintiffs' client account was 'trust money' to which r 7(b) applies and that accordingly the purported application of the amount invoking r 7(a)(iv) was not in order.

'Client's money' and 'trust money' are defined in the rules as follows:

> 'client's money' means money held or received by a solicitor on account of a person for whom he is acting in relation to the holding or receipt of such money either as a solicitor or in connection with his practice as a solicitor, agent, bailee, stakeholder or in any other capacity; but the expression 'client's money' does not include —
>
> (a) money held or received on account of the trustees of a trust of which the solicitor is solicitor-trustee; or
> (b) money to which the only person entitled is the solicitor himself or, in the case of a firm of solicitors, one or more of the partners in the firm.
>
> 'Trust money' means money held or received by a solicitor which is not client's money and which is subject to a trust of which the solicitor is a trustee whether or not he is solicitor-trustee of such trust.

Thus money held in a solicitors' client account with a bank could, at least in theory, include money which is

not 'client's money' and if, and only if, such money (which is not client's money) is the subject of a trust does it come within the definition of 'trust money'. There are two ingredients: (1) it must not be 'client's money' and (2) it must be the subject of a trust. If the money was 'client's money' within the terms of the definition of that phrase in the rules, then even if it is the subject of a trust it is not 'trust money' within the meaning of that phrase in the rules. If, however, the money was received on account of *trustees of a trust* of which the solicitor is solicitor-trustee, by the exclusion (a) to the definition of 'client's money' such money, even though it is held in the client account, is not 'client's money'.

I pause to note that it cannot but be that all money held in a client account of a solicitor (apart from money to which the only person entitled to it is the solicitor himself or in the case of a firm of solicitors, one or more of the partners in the firm) is money held in trust by the solicitor in the sense that he is not the beneficiary of the money. However, the said exclusion (a) to the definition of 'client's money' and the definition of 'trust money' have the effect, as has been seen, that for the purposes of the rules, only money which does not fall within the definition of 'client's money' and which is subject to a trust is to be regarded as 'trust money'.

It has to be emphasized that it is only money held or received on *account of trustees of a trust of which the solicitor is solicitor-trustee* that is excluded from what is defined as 'client's money'. If money even though held in trust is not excluded as aforesaid, because of the definition of 'client's money' it will not come within the meaning of 'trust money' as 'trust money' is defined not to include 'client's money'.

As I understood it, the manner in which the $319,562 came to be in the plaintiffs' client account to the credit of the defendant bank was as follows. The plaintiffs acted as solicitors for a certain developer who owed the defendant bank substantial sums of money. Certain other clients of the plaintiffs had entered into agreements with the developer for the purchase of houses to be built by the developer. These purchasers who were government servants had borrowed money from the loan division of the government for the purchase of the houses. The aggregate of the amounts lent to these various purchasers was $317,562. This was paid to the plaintiffs by the loan division to be paid to the developer towards the purchase price of the houses bought by the purchasers. At that stage, clearly the plaintiffs held the money in trust to be paid to the developer. But it was not held or received on account of trustees of any trust. Accordingly it fell within the definition of 'client's money'.

The developer directed the plaintiffs to pay the $317,562 to the defendant bank upon certain undertakings being given. These were duly provided whereupon the money was deemed to be held or received by the plaintiffs on account of the defendant and it was clearly held or received as aforesaid in connection with the plaintiffs' practice as solicitors within the meaning of the said definition of 'client's money' in the rules.

In any event, it cannot but be that at that stage the amount stood as credited to the defendant in the plaintiffs' client account within the terms of r 15 of the rules.

Our Solicitors' Account Rules 1978 were adapted from the English Solicitors' Accounts Rules 1975 and the definitions of 'client's money' and 'trust money' in the English and the Malaysian rules are identical.

In the commentary in respect of the definitions of 'client's money' and 'trust money' in Vol 2 of *The Supreme Court Practice* (1979 Ed) para 3759 has it that:

> 'Client's money' is defined in terms which include in effect all money received by a solicitor on account of any person for whom he is acting as solicitor or, in connection with his practice, as agent, bailee, stakeholder or in any other capacity, that is to say, in general terms, practically all money received by a solicitor in connection with his practice which is not his own money.

At para 3763, certain difficulties arising out of the definitions are noted (emphasis provided):

> 'Trust money' — This is defined by r 2 as money subject to a trust of which the solicitor is a trustee. There are many cases where a solicitor who is a trustee receives money in connection with the trust in circumstances in which *it is difficult* to determine forthwith upon receipt whether he receives the money in the capacity of solicitor, or in the capacity of trustee. The option afforded to him by r 4 of paying this money into client account is designed to relieve the solicitor of the difficulty of determining on receipt whether or not the money is technically client's money. It should be observed that if the trustees of the trust to which the money is subject are the solicitor himself, or the solicitor and a partner, clerk or servant of his or more than one of such persons, the money cannot by definition be client's money. This is necessary to avoid a conflict with the Solicitor's Trust Accounts Rules. Nevertheless r 4 enables a solicitor to pay money of which he is a solicitor-trustee *in this limited sense* into a client account if he so desires.

Applying the definitions to the facts of the instant case, the said amount, even if it may have been 'trust money' when it was initially paid to the solicitors by the government loan division (in all probability it was not), metamorphosed into 'client's money' when it was deemed to be held to the credit of the defendant.

In any event, as has been pointed out, r 15 preserves the solicitors' right of recourse by way of lien, set-off, counterclaim, charge or otherwise against money standing to the credit of a client's account.

Accordingly even if the money paid in by the loan division to be paid to the developer became, on the instructions of the developer, money to be paid to the

defendant and in spite of the metamorphosis continued to be trust money, the beneficiary of the money now being the defendant, the plaintiffs had the right of recourse (in respect of the fees owed by the defendant) by way of, inter alia, set-off against the money standing to the credit of the defendant. 'Set-off' here is not to be limited to a set-off pleaded in a statement of defence but has reference to the right of setting off the amount owed against the amount held. In the context such setting off means the settling of the account between the parties and, in my judgment, can be implemented by drawing on the amount due as was done here.

One other matter that has to be dealt with is the effect of the appointment of the receivers and the order of the court that gave directions to the receivers. The short answer to the problem is that the said appointment and the said order of court, not being retrospective in effect, have no relevance to the issues herein in that they came into existence well after the drawings had been effected by the plaintiffs.

Accordingly the plaintiffs are entitled to the declarations sought in prayers (i) and (ii) of the originating summons. I also hold that, in any event, the plaintiffs were, because of r 15, entitled to set off the amount owing by the defendant and that, accordingly, it was in order for the plaintiffs to do so by drawing on the money held in the client account. The costs of and incidental to the application will be paid by the defendant.

*Application allowed.*

Solicitors: *Joginder Singh & Co; Rashid & Lee.*

Reported by *PS Ranjan*

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# Ku Yan bte Ku Abdullah v Ku Idris bin Ku Ahmad & Ors

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24-1343-89
KC VOHRAH J
13 OCTOBER 1991

*Land Law — Partitioning of land — Application for partitioning by co-proprietor holding majority share in land — Other co-proprietors not joining in or giving consent — Whether application must be made to land administrator in first instance — Whether applicant may apply to High Court — National Land Code 1965 ss 140, 141, 141A & 145*

The plaintiff held a 5/7th undivided share in a piece of land in the state of Kedah. The defendants held the remainder. The plaintiff applied to the land administrator for the land to be partitioned. The application was rejected by the Director of Land and Mines who advised the plaintiff to apply to the High Court for an order for partitioning the land. The plaintiff made such an application to the High Court under s 145 of the National Land Code 1965 showing a proposed plan. Later the application was amended to include, inter alia, a new proposed plan. The defendants contended that the court had no jurisdiction to decide on the new application. They said that since there was a new proposed plan the plaintiff had to apply to the land administrator to partition the land in accordance with s 141A of the Code before the matter would be dealt with by the court.

**Held,** dismissing the defendants' objection:

(1) Section 141A of the Code does not compel a co-proprietor holding the majority share in a piece of land to apply to the land administrator for approval to partition the land; it is merely a permissive section.

(2) A co-proprietor having the majority share in a piece of land thus is not barred from applying to the High Court under sub-s (1) of s 145 of the Code to have the co-proprietorship terminated and the land partitioned under s 145 on the general ground that a co-proprietor will not join in nor consent to the making of an application for partitioning.

**[Bahasa Malaysia summary**

Plaintif memegang 5/7 bahagian yang tidak dibahagikan dalam sebidang tanah di negeri Kedah. Defendan memegang bakinya. Plaintif memohon kepada pentadbir tanah untuk tanah itu dipecah milik. Permohonan itu ditolak oleh Pengarah Tanah dan Galian yang menasihatkan plaintif supaya memohon kepada Mahkamah Tinggi untuk perintah pemecahan milik tanah itu. Plaintif membuat permohonan sedemikian kepada Mahkamah Tinggi di bawak s 145 Kanun Tanah Negara 1965 dengan menunjukkan satu pelan cadangan. Selepas itu permohonan itu dipinda untuk memasukkan, antara lainnya, satu pelan cadangan yang baru. Defendan berhujah bahawa mahkamah tidak ada bidang kuasa untuk mempertimbangkan permohonan yang baru itu. Kata mereka memandangkan yang terdapat satu pelan cadangan yang baru plaintif harus memohon kepada pentadbir tanah untuk memesah milik tanah itu menurut s 141A Kanun itu sebelum perkara itu boleh dipertimbangkan oleh mahkamah.

**Diputuskan,** menolak bantahan defendan itu:

(1) Seksyen 141A Kanun itu tidak mewajibkan seorang tuan tanah bersama (co-proprietor) yang memegang syer